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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JENNIFER PURSELL, Petitioner/Appellant, v. STEVE PURSELL, Respondent/Appellee.	2 CA-CV 2010-0142 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO200900218

Honorable James L. Conlogue, Judge

AFFIRMED

Patricia Taylor
Tucson
Attorney for Petitioner/Appellant

Law Office of Michael E. Farro
By Michael E. Farro
Sierra Vista
Attorney for Respondent/Appellee

B R A M M E R, Presiding Judge.

¶1 Jennifer Pursell appeals from the decree dissolving her marriage to appellee Steve Pursell. She challenges the trial court's order awarding Steve sole legal and primary physical custody of the parties' minor child, Katherine, ordering Jennifer to

pay $601 per month for child support, and dividing the parties' assets and debts. Jennifer asserts the court erred because there was insufficient evidence to support its custody decision, and because it failed to apply a presumption against awarding Steve custody pursuant to A.R.S. § 25-403.03(D) or to make sufficient findings pursuant to A.R.S. § 25-403. She also argues the court denied her due process right to a fair trial, divided the parties' property inequitably, and improperly determined the amount of child support owed.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the decree. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). Jennifer petitioned for the dissolution of her marriage to Steve, and both parties requested sole legal and primary physical custody of Katherine. The parties were not able to reach a negotiated settlement agreement through mediation, and a temporary orders hearing and trial were held.

¶3 At the final marital dissolution trial, the court heard testimony from the parties and other witnesses including Jennifer's medical doctor regarding her hepatitis B and cirrhosis of the liver conditions, relatives of the parties and friends of the family regarding the parties' relationship to each other and to Katherine, and experts as to the value of the family residence and other assets. The court also considered, among other evidence, the report of Dr. Hodgson, a psychologist who had evaluated Katherine. The court took judicial notice of the evidence presented at the temporary orders hearing, including additional testimony by the parties.

¶4 The trial court found that, during an argument between the parties, Steve had "grabbed [Jennifer's] arm in order to stop [her] from leaving with Katherine" and as a result had bruised her arm. Based on that incident, the court found "by a preponderance of the evidence that [Steve had] recklessly caused [an] injury" to Jennifer satisfying the definition of domestic violence found in A.R.S. § 13-3601(A) and the definition of "significant domestic violence" in A.R.S. § 25-403.03(A). However, the court found the domestic violence incident to be "an isolated event" that did not meet the definition of "domestic violence" that would trigger a presumption against custody pursuant to § 25-403.03(D) because there was "no serious physical injury, no reasonable apprehension of serious physical injury and no 'pattern of behavior.'"

¶5 The trial court made specific findings based on six of the factors listed in A.R.S. § 25-403(A), found that joint legal custody was "not possible" due to the domestic violence incident and because the parties were "not able to communicate to the extent necessary to make joint decisions," and found that it was in Katherine's best interest to award Steve legal and primary physical custody. The court did so and ordered that he was responsible for Katherine's medical insurance, granting Jennifer specified parenting time and requiring her to pay $601 each month in child support. The court made findings as to the value of the parties' property, and divided it by, inter alia, awarding Steve the family residence, a 1975 Cessna airplane, and vehicles other than Jennifer's 2006 Acura, which the court awarded to Jennifer. Steve also was ordered to assume all debts owed on those assets awarded him.

¶6 Jennifer filed an objection to the form of judgment, and a motion for a new trial and to amend findings. The court denied her motions. This appeal followed.

Discussion

Domestic Violence Presumption, A.R.S. § 25-403.03(D)

¶7 Jennifer argues the trial court abused its discretion in failing to apply a presumption against awarding Steve custody pursuant to A.R.S. § 25-403.03(D) because the court found he had committed "significant domestic violence" under § 25-403.03(A). We review a court's interpretation of statutes de novo. *Pima County v. Pima County Law Enforcement Merit Sys. Council*, 211 Ariz. 224, ¶ 13, 119 P.3d 1027, 1030 (2005); *LaWall v. Pima County Merit Sys. Comm'n*, 212 Ariz. 489, ¶ 4, 134 P.3d 394, 396 (App. 2006).

¶8 The relevant portions of § 25-403.03 provide the following:

> **A.** Notwithstanding subsection D of this section, joint custody shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to § 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.
>
> **B.** The court shall consider evidence of domestic violence as being contrary to the best interests of the child. The court shall consider the safety and well-being of the child and of the victim of the act of domestic violence to be of primary importance. The court shall consider a perpetrator's history of causing or threatening to cause physical harm to another person.
>
> . . . .
>
> **D.** If the court determines that a parent who is seeking custody has committed an act of domestic violence against

> the other parent, there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests. This presumption does not apply if both parents have committed an act of domestic violence. For the purposes of this subsection, a person commits an act of domestic violence if that person does any of the following:
>
> 1. Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury.
>
> 2. Places a person in reasonable apprehension of imminent serious physical injury to any person.
>
> 3. Engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.
>
> . . . .
>
> **F.** If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development. If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm . . . .

¶9 First, Jennifer suggests that because the trial court found the domestic violence incident "significant" under § 25-403.03(A), it also should have found that incident constituted "an act of domestic violence" under § 25-403.03(D). However, the definition of "domestic violence" in § 25-403.03(D) is more limited than the definition of that term in § 25-403.03(A). Whereas the former provides only three categories of behavior that trigger a presumption against custody, the latter allows any significant domestic violence act as defined by the criminal code to preclude joint custody.

Therefore, a finding of significant domestic violence under § 25-403.03(A) does not necessarily give rise to a presumption against custody pursuant to § 25-403.03(D).

¶10 Jennifer also argues the incident constituted "domestic violence" as defined by § 25-403.03(D)(3) because she could have obtained an order of protection against Steve. However, the statute does not define domestic violence as any incident that would entitle the victim to an order of protection, but as a "pattern of behavior" that warrants such protection. § 25-403.03(D)(3). The requirement that the acts constitute a pattern is significant because an order of protection may be granted when a person has "committed an act of domestic violence within the past year or within a longer period of time if the court finds that good cause exists." A.R.S. § 13-3602(E)(2). Therefore, absent the requirement of a pattern, any act of domestic violence under § 13-3601 would trigger the presumption against custody, rendering superfluous the more rigorous requirements of § 25-403.03(D)(1) and (D)(2). *See State v. Brown*, 204 Ariz. 405, ¶ 16, 64 P.3d 847, 851 (App. 2003) ("[W]e must give meaning to each word or phrase so that none 'is rendered superfluous, void, contradictory or insignificant.'"), *quoting State v. Superior Court*, 113 Ariz. 248, 249, 550 P.2d 626, 627 (1976). In this case, the trial court found there had been no "pattern of behavior" that would satisfy the definition of domestic violence under § 25-403.03(D)(3). As discussed next, sufficient evidence supported that finding. Therefore, the court did not abuse its discretion when it found neither party had been involved in domestic violence as defined in § 25-403.03(D) and declined to invoke a presumption against awarding custody to Steve.

¶11 Additionally, Jennifer argues the trial court "failed to consider and properly weigh" the evidence of domestic violence according to § 25-403.03(B). That statute does not require the court to make specific findings, but does require it to consider evidence of domestic violence and the parties' safety and well-being. § 25-403.03(B).

¶12 The trial court heard evidence regarding all alleged domestic violence. Jennifer introduced evidence about additional, allegedly threatening or abusive behavior by Steve. Steve presented testimony from his mother, his sister, and three family friends that none had witnessed any domestic violence or escalated arguments between the parties. Additionally, Hodgson reported that Katherine "did not exhibit signs of being an abused child or of being traumatized by witnessing parental 'abuse' of another parent." Jennifer offers nothing nor does the record support her contention that the court did not consider the evidence presented and its significance to the safety of the parties. To the contrary, the court's findings establish it did and that it weighed the evidence about the incident against Steve in connection with its determination of which parent should be awarded Katherine's custody. It is for the trial court, not this court, to determine how much weight to give the evidence presented. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004) (trial court in best position to weigh evidence and judge witness credibility). Additionally, we presume trial courts know and follow the law. *See State v. Johnson*, 212 Ariz. 425, ¶ 21, 133 P.3d 735, 742 (2006). Keeping these principles in mind, and granting to the court the deference to which it is entitled, we assume it considered and properly weighed the evidence of domestic violence as required by § 25-403.03(B).

¶13 Jennifer also contends the trial court failed to apply § 25-403.03(F). Based on that subsection, a parent who commits an act of domestic violence and is awarded parenting time must prove "that parenting time will not endanger the child or significantly impair the child's emotional development"; the court also must place certain conditions on the parenting time. § 25-403.03(F). Section § 25-403.03(F) does not apply in this case, however, because Steve was awarded custody, not parenting time. Moreover, as discussed below, the record supports the court's determination that awarding Steve custody is in Katherine's best interest, and it is implicit in that finding that to do so would not endanger or emotionally impair her. *See Munari v. Hotham*, 217 Ariz. 599, ¶ 15, 177 P.3d 860, 863 (App. 2008) ("best interests" an encompassing concept allowing court to consider all circumstances of child's life).

Sufficiency of Findings, A.R.S. § 25-403(B)

¶14 Jennifer argues the trial court failed to make the requisite findings pursuant to § 25-403. We review a court's custody determination for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). Pursuant to § 25-403(A), when determining custody, a court, "in accordance with the best interests of the child," must consider "all relevant factors," including those listed in the statute. Additionally, in a contested custody case, a court is required to "make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." § 25-403(B).

¶15 Jennifer challenges the sufficiency of the trial court's findings regarding four factors discussed in the decree, and the sufficiency of the evidence supporting those

findings.[1] We will uphold a court's findings of fact "unless they are clearly erroneous," *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002), because the trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts," *Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945.

¶16 First, Jennifer asserts the trial court did not give adequate weight to Katherine's wishes as to her custodian. She argues Katherine's wishes and Hodgson's testimony support Jennifer being awarded more parenting time. The decree, however, makes clear the court considered Katherine's desire to be with both parents as much as possible, but relied, in part, on Hodgson's testimony about the parties' "meanness" to one another in deciding that joint custody would not be in Katherine's best interest. And again, it was for the trial court to determine, in the exercise of its discretion, how much weight to give this factor in rendering a custody decision.

¶17 Second, Jennifer argues there was no evidence upon which the trial court could have based its finding that Steve is "more likely to support" Katherine's relationship with her paternal grandparents. But both Steve and his mother testified they were concerned that if Jennifer were the primary decision-maker, she would not facilitate

[1]Although Jennifer asserts the court failed to "make findings as to all relevant factors," she identifies no relevant factor it failed to address. Because she has not developed this argument adequately, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 394 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

contact between Katherine and her paternal relatives. Additionally, Hodgson reported that Katherine had said "her mother wants to keep her from seeing her [d]ad." The record, therefore, supports the court's finding.

¶18 Third, Jennifer alleges the trial court did not "weigh the impact" that changing Katherine's activities or school would have on her best interests. Jennifer suggests the court did not consider or give adequate weight to Katherine's adjustment to school and activities, and did not make the required findings as to that factor. But evidence was presented at trial regarding Katherine's many activities and the parties' opinions about when she should begin school, and Steve informed the court that Katherine would begin her second year of school at a different school. The record belies Jennifer's unsupported suggestion that the court did not consider this evidence. The court ultimately found that Katherine was "well-adjusted to home, school and community," noted that she will remain in the family home, commented on her ability to succeed in school despite some problems caused by starting school at an early age, and found that her paternal relatives are a part of her community. Jennifer does not offer any authority, and we find none, requiring the court to make a specific finding regarding an anticipated change in school placement.

¶19 Finally, Jennifer challenges the trial court's finding that Jennifer "will experience difficulties as a single parent" caring for the child "for longer periods over a prolonged span of time" claiming the finding is contrary to the court's prior temporary order establishing co-parenting, and is not supported by any evidence of health problems. Dr. Krasinski, Jennifer's physician, testified that as of June 2009 there were no problems

with Jennifer's liver condition that would cause fatigue or affect her ability to care for a young child. However, at least five other witnesses testified that Jennifer was fatigued easily and would nap regularly during social occasions. Both Steve and his relatives testified they worried Jennifer's fatigue could place Katherine at risk.

¶20 Because there was sufficient evidence upon which the trial court based each of the challenged findings, we find no abuse of the court's discretion under § 25-403.[2]

Sufficiency of Evidence Supporting Custody Decision

¶21 Jennifer argues the trial court had "no justification" for awarding Steve sole legal and primary physical custody because there is no evidence supporting its decision to limit Jennifer's parenting time. "In awarding child custody, the court may order sole custody or joint custody. [There is no] presumption in favor of one custody arrangement over another . . . ." A.R.S. § 25-403.01(A). We review the court's custody determination for an abuse of discretion. *See Owen*, 206 Ariz. 418, ¶ 7, 79 P.3d at 669.

¶22 The trial court found joint custody was not in Katherine's best interests because significant domestic violence had occurred and because "the parties are not able to communicate to the extent necessary to make joint decisions." The record contains evidence that supports this finding, including, for example, Hodgson's testimony about

[2]Jennifer also argues there is "no evidentiary basis" for finding that, although Steve's act of domestic violence weighs against him, "the other factors weigh heavily in his favor." Because we have determined the court had an evidentiary basis for finding the discussed factors weighed in Steve's favor, we do not address this argument further.

the parties' "meanness" to one another and testimony that the parents disagreed regarding Katherine's education, religion, and extracurricular activities.

¶23 The trial court made specific findings supporting its determination that awarding custody to Steve was in Katherine's best interests, and these findings were supported by sufficient evidence. Therefore, the court did not abuse its discretion in awarding her sole legal and primary physical custody to Steve.

Due Process Right to Cross Examination

¶24 Jennifer next argues the trial court denied her due process right to a fair trial by "refusing to allow [her] to cross examine [Steve]" after counsel's time had expired at trial. Because Jennifer failed to object below, we do not consider the issue on appeal. *See In re MH 2009-001264*, 224 Ariz. 270, ¶ 7, 229 P.3d 1012, 1014 (App. 2010) ("'[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal.'"), *quoting Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000).

Valuation of Property

¶25 Jennifer argues the trial court's division of the parties' property was "inequitable" because it awarded Steve "virtually all of the community property" and failed to consider improvements made to the family residence and income historically received from renting the airplane. In a dissolution, a court must divide the community property "equitably, though not necessarily in kind." A.R.S. § 25-318(A). We will uphold a court's division of community property absent an abuse of discretion and view

the evidence in the light most favorable to sustaining the court's findings. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998).

¶26 The record contains evidence to support the trial court's valuations of the family residence and the airplane's negative equity. Jennifer's expert, who provided the most recent appraisal of the family residence, considered the improvements made to the home when making his estimate. Nonetheless, the court found the appraisal did not value the improvements made to the home sufficiently and decided the negative equity in the home was approximately $5,000 instead of the approximately $50,000 difference between the mortgage balances and the appraisal value. Therefore, Jennifer's argument that the court "made no finding" about the value of the home improvements is clearly belied by the record and the court's finding that there was $5,000 of negative equity in the house. Similarly, testimony of an airport employee who provided information about the value of the airplane explained that it could not be leased until its fuel tank was replaced and its engine overhauled, estimated to cost about $20,000. Therefore, there was evidence to support the finding that the airplane had negative equity, and was not "paid for by leasing fees," as Jennifer suggests.

¶27 Regarding her general argument that Steve was awarded much of the community property, Jennifer fails to identify which assets the trial court should not have awarded him. The record establishes Jennifer agreed at trial that Steve be awarded the airplane and vehicles other than Jennifer's Acura, subject to the debts owed on those items. She acknowledged only the 1993 motor home and 2005 Fifth Wheel had any positive equity and the airplane had a larger negative equity. The record thus provides

sufficient evidence upon which the court could have based its decision to award Steve these assets and order him to pay the debt owed on each, and it therefore did not abuse its discretion.

Child Support Findings

¶28 Jennifer next asserts the trial court erred in ordering her to pay $601 in monthly child support. "Child support awards are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State ex rel. Dep't of Econ. Sec. v. Ayala*, 185 Ariz. 314, 316, 916 P.2d 504, 506 (App. 1996). *See also* A.R.S. § 25-320(A) ("[T]he court may order either or both parents . . . to pay an amount reasonable and necessary for support of the child . . . ."). Jennifer contends the court did not account for additional income Steve receives from leasing the airplane. *See* § 25-320(D)(2) (relevant factors for determining child support include financial resources of custodial parent). As we noted above, there was evidence Steve is not receiving any income from renting the airplane because it is grounded indefinitely. Jennifer also argues she will continue to pay Katherine's medical insurance costs, expenses that should be taken into account. However, she is under no obligation to assume those expenses, as the court has ordered Steve to pay for Katherine's medical insurance. Therefore, Jennifer has provided no evidence the court abused its discretion in determining the amount of her child support obligation.[3]

[3]Although Jennifer also argues the trial court was required to make additional findings regarding her past payments of medical insurance and other child expenses, she cites no authority to support her argument, and so we do not address it. *See* Ariz. R. Civ.

Disposition

¶29 We affirm the trial court's order. We also grant Steve's request for an award of attorney fees and costs on appeal pursuant to A.R.S. § 25-324 pending his compliance with Rule 21(c), Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on").